IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 8TH NOVEMBER 2006 / 17TH KARTHIKA 1928

CRL.A.No. 401 of 2006()

SC.237/2004 of ADDL. SESSIONS COURT (FAST TRACK-I), TRIVANDRUM

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APPELLANT(S):

SOMAN, S/O.CHELLAPPAN @ MANAS,
C.NO.9602, CENTRAL PRISON, POOJAPPURA,
THIRUVANANTHAPURAM 695 012.

BY ADV. SRI.MUHAMMED ALRAFI(STATE BRIEF)

RESPONDENT(S):

THE STATE OF KERALA, REP. BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

PUBLIC PROSECUTOR SRI.C.M.NAZAR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 8.11.2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.HEMA, J.

CRL.A.NO.401 OF 2006

Dated this the 8th day of November, 2006

JUDGMENT

This appeal arises from conviction and sentence passed against the appellant under Section 55(a) of the Abkari Act ('the Act', for short) to undergo rigorous imprisonment for one year and to pay a fine of Rs.1,00,000/- and in default of payment of fine to undergo rigorous imprisonment for six months.

2. According to prosecution, PW2, the Sub Inspector was on patrol duty on 17.12.2001 at about 6.15 p.m and he found the accused carrying a can and pouring something into a glass and a person standing nearby. On being suspicious, PW1 along with the police party approached the accused while the other person ran away. The accused attempted to run away who was carrying the can and the glass, MO1 and MO2 and he was apprehended. On questioning, it was revealed that he was engaged in sale of arrack. The can was examined and the liquid in the can, on smell and taste, was found to be arrack. The glass was also having the smell of arrack and hence the accused was arrested from the spot.

3. The body search of accused was conducted and Rs.230/- was seized from the pocket of the shirt worn by the accused. The can contained about 1 ½ litre of arrack. The contraband articles were seized

from the scene of occurrence and sealed under a mahazar, Exhibit P1, prepared at the scene. The mahazar is attested by Pws 2 and others. The FIR was registered on the same day as Exhibit P2 and on investigation a charge sheet was laid against the appellant for offence under Section 55 (a) of the Act. Steps were taken for getting sample drawn from the liquor in the can and chemical analysis and on analysis as per Exhibit P3 the Chemical Analysis Certificate, the article was reported to be contained ethyl alcohol.

4. To prove the prosecution case, PWs 1, 2 and 3 were examined, Exhibits P1 to P3 and MO1 to MO3 series were marked. The accused did not adduce any evidence. But while he was questioning under Section 313 Cr.P.C, he stated that it is a false case foisted against him at the instance of two policemen who had enmity towards him. He stated that when he was sitting in the house, two policemen came to the house and enquired about his son and the accused was taken out of the house and he was made to stand on the courtyard. The other policemen went inside the house and took Rs.2,150/- which was kept in the draw of the table. The accused explained to him that it was kept for his daughter's requirement and that she was a patient. The accused was brought to the police station. But he was remanded. The persons who came to the house were Surendran and Soman. Accused was released on bail and he sent a complaint to the Director General of Police against the two policemen.

Thereafter also he was taken away by force and he was harassed for three days at the police station and on the fourth day at about 10 a.m he was left out. Thereafter when he was coming back, he was taken away and tortured by the police stating that he had given a complaint to the Director General of Police. He has not committed any offence and he is innocent of the allegations made.

5. On analysis of the evidence in this case the court below found that the prosecution proved the case beyond reasonable doubt as per the evidence of Pws 1 and 2. According to the lower court, nothing is brought out from the evidence of PW2 to discredit his version. He did not find any reason to disbelieve PW2. It was found that the accused was produced before the court on 18.12.2001, the date on which the incident allegedly occurred. FIR was also produced in the court on the same day along with the mahazar. So, there was absolutely no delay either in reporting the matter of seizure of the article or in producing the contraband before the court. Therefore, the prosecution proved that the accused was in possession of one-and-a-half litre of arrack on the date and time as alleged by the prosecution. He was found guilty of offence under Section 55(a) and sentence was imposed against him.

6. To prove the prosecution case, the evidence available is that of Pws 1 and 2. PW1 is an attester to the mahazar who was declared as hostile. PW2 is the Sub Inspector who has detected the crime registered

the FIR and also investigated the crime and submitted the charge sheet before the court. A definite contention is made against the police that the accused was being tortured at the police station because he had given a complaint before the DGP alleging that two policemen, Surendran and Soman had taken away Rs.2,150/- from his house. It is true that this allegation was denied by the witnesses, but the suggestion was made even from the right beginning while PW1 was examined. In spite of the fact that allegations were made against the police on these lines, the prosecution examined only PW2, the Sub Inspector and none of the other police officials who were allegedly present at the time of seizure was examined. Even though PW1 was treated as hostile, no other evidence was produced to corroborate the evidence of PW2. In the above circumstances, the evidence of Pws 1 and 2 has to be looked into with care and caution.

7. There is a definite case for the accused that this is a falsely foisted case at the instance of the two policemen against whom he had filed a complaint. PW2 is stated to be the detecting officer who deposed that he has detected the crime on the date and time alleged by the prosecution. But, his evidence discloses that he had not complied with the mandatory provision contained in the Abkari Act, which provides safeguard to the accused.

8. There is clear violation of Section 40 of the Abkari Act. A

reading of Section 40 of the Abkari Act shows that any officer arresting a person under section 31, Section 34 or Section 35 of the Act shall be produced before the officer in charge of the nearest police station or before the officer empowered under Section 5(a) or to the Abkari Inspector. It also provides that the article seized under Section 34 of the Act shall also be forwarded to such persons without unnecessary delay. The arrest made in this case and the seizure made by PW2, the Sub Inspector who is an Abkari Officer is under section 34 of the Act. He is, therefore, bound to comply with the mandatory requirement under Section 40(3) of the Act. He is bound to produce the accused arrested by him and the article seized by him under Section 34 without unnecessary delay to the officer-in-charge of the nearest police station or to the officer empowered under section 55(a) of the Act or to the Abkari Inspector.

9. The expression 'shall' used in Section 40 indicates that the provision is mandatory in nature. It is intended to protect the interest of the accused against unnecessary harassment and prevent false implication at the hands of another Abkari Officer. Section 40 provides a safeguard to the accused since production of the accused before the officer-in-charge of the nearest police station or other officer as referred to in Section 40(3) (a) and (b) of the Act will provide an opportunity to accused to explain the circumstances under which he was arrested. The said officer can also take care of the article seized and steps can be taken by him for disposal of

such article. But PW2 acted in violation of Section 40(3) of the Act and hence the accused is entitled for an acquittal on this ground itself.

10. It can also be seen that it is the duty of the authority or the officer to whom article seized under section 34 is forwarded to despatch for disposal of such article. Such officer shall take necessary steps in accordance with law for disposal of such article. The authority under sub-section (5) of section 40 is vested with the officer to whom the article is produced under sub-section (3) of section 40 to take all necessary steps in accordance with law for disposal of the article. This will include the production of the article before the court.

11. But in this case there is violation of Section 40(5) of the Act also. According to PW2, he questioned the witness and produced the material objects before the court. It is not explained why and under what circumstances he produced the articles in violation of sub-section (5) of Section 40 of the Act. PW2 being the Sub Inspector, who detected the crime, arrested accused and seized the articles does not have the power to produce the article or take any step for disposal of the article seized under Section 34 of the Act. PW2 has acted in violation of the said provision also.

12. It is also to be noted that PW2 stated that the article, MO1 can with the contents was seized from the place of occurrence. It was seized and labelled which contained the signatures of the witnesses. But MO1

produced in this case did not contain any such label. This cast a doubt as to whether MO1 was the article seized from the place of occurrence as alleged by the prosecution. Regarding MO2 also the same doubt would arise. In Exhibit P1 mahazar an identifying feature is noted on the glass., ie., the glass contained a writing as 'lazer-38' at the bottom of the glass. But in evidence PW2 candidly admitted that the glass produced in the court which is marked as MO2 did not contain such writing.

13. Therefore, it cannot be said that either MO1 or MO2 were allegedly seized from the accused at the scene of occurrence. Consequently, the sample allegedly drawn from MO1 and chemical analysis report cannot be used as incriminating evidence against accused. As per the evidence of PW2, a sample was drawn from the liquid in MO1 and the said sample was sent for analysis. In the light of the discussion made, I find that Exhibit P3, chemical analysis report will not be sufficient to prove that the article allegedly seized from the possession of the accused was liquor.

14. Though the above discussion itself is sufficient to acquit the accused, I find that I shall briefly discuss the shabby nature of the evidence and the contradictions which appear in the evidence of Pws 1 and 2. PW1 would say that at the time when he saw the accused, he found running away and the policemen chasing and catching him. But PW2 stated that the accused did not run away at all. He attempted to run, but

he did not run and he was caught at the spot itself. PW2 also stated that on body search currency notes were seized from the pocket of the shirt worn by the accused. But PW1 would say that the shirt was found lying nearby in the bush from which the currency notes were seized. It can also be seen in the evidence of PW2 that he had seen the accused pouring arrack into the glass from the can (MO2 to MO1) when he was found. But in the cross-examination he deposed that the can was found closed when it was seized. The version given by PW1 that the accused was found pouring liquor into the glass appears to be doubtful. Though the learned Public Prosecutor submitted that these are minor contradictions, in the light of the discussions already made, I do not find any reason to discard the contradictions as minor. This is specially so since there is no independent corroboration to the version given by PW2. In the above circumstances, I hold that the prosecution has failed to establish on the basis of the evidence of PWs. 1 and 2 that the alleged seizure of MO1 and MO2 at the spot from the possession of the accused. The accused is, therefore, entitled for an acquittal.

15. In the result, the conviction and sentence passed against the appellant under Section 55(a) of the Abkari Act are set aside. The appellant is found not guilty and is acquitted of offence under Section 55 (a) of the Abkari Act. He is set at liberty forthwith. If appellant is still in custody, he shall be released forthwith. The Registry shall issue release

memo to the jail authorities concerned immediately.

Appeal is allowed.

K.HEMA, JUDGE

vgs.

K.HEMA, J.

CRL.A.NO.401 OF 2006

JUDGMENT(GIST)

8.11.2006